



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

SECOND APPEAL NO. 128 OF 1993

1. Jaibai w/O Rangnath Keskar,
Age : 65 Years, Occ. Household,
2. Rajaram S/o Rangnath Keskar,
Age : 41 Years, Occ. Agriculture,

Both R/o, Village Yelamba
Ghat, Taluka and District Beed.

... APPELLANT
(Orig. Plaintiffs)

VERSUS

1. Gangubai W/o Bhanudas Sakhare,
Died Through L.Rs.
- 1-A Narayan S/o Bhanudas Sakhare,
Age: 45 Years, Occ. Agriculture,
- 1-B Gorakhnath S/o Bhanudas Sakhare,
Age: 35 Years, Occ. Agriculture
- 1-C Mathurabai W/o Saudegar Kadam,
Age: 30 Years, Occ. Household,

1-A to 1-C Resident of Yewata (Sakhare Wasti),
Taluka Kaij, District Beed.

2. Shivling S/o Bajirao Keskar,
Age : 60 Years, Occ. Agrilcutre,
R/o. Jaitalwadi, Tq. U/v Yelamba Ghat,
Taluka Kaji, District Beed.
3. Sitaram S/o Bajirao Keskar,
Age : 55 Years, Occ. Agriculture

4. Damodhar S/o Bajirao Keskar,
Age : 25 Years Occ. Agri,

Resident of Jaitalwadi Tq.U/v Yelamba
Ghat, Taluka Kaij, District Beed.
5. Gayabai W/o Dashrath Pawar,
Age : 48 Years, Occ. Household,
R/o. Saswadi Taluka Kaij,
District Beed.
6. Annapurna W/o Narayan Sakhare,
Age : 40 Years, Occ. Household,
R/o. Yewata Taluka Kaij,
District Beed.
7. Mankarnabai W/o Suryabhan Dambe,
Age: 38 Years, Occ. Household,
R/o. Jaitalwadi Taluka Kaij,
District Beed.
8. Ramrao S/o Rangnath Kadam
Age : 80 Years, Occ. Agri.
R/o. Yelamb Ghat, Taluka and
District Beed.
9. Ashruba S/o Khushana Pawar,
Age: 60 Years, Occ. Agri.
R/o. Devgaon Taluka Kaij,
District Beed.

.. RESPONDENTS
(Orig. Defendants)

WITH
SECOND APPEAL NO. 205 OF 1993

Gangubai Bhanudas Sakhare died
Died Through Lrs.,

- 1-A Narayan S/o Bhanudas Sakhare,

Age: 45 Years, Occ. Agriculture,
R/o Yewata (sakhare Vasti)
Tq. Kaij District Beed.

1-B Gorakhnath S/o Bhanudas Sakhare,
Age: 35 Years, Occand
Resident as above.

1-C Mathurabai W/o Saudagar Kadam
Age: 30 Years Occ. Household,
R/o. As above

2. Shivling S/o Bajirao Keskar,
Age: 46 Years, Occ. Agriculture,
R/o. As above.

..APPELLANTS
(Orig. Defendants 2 &3)

VERSUS

Rajaram Rangnath Keskar,
Age: 27 Years, Occ. Agriculture,
R/o. Yellamb Ghat
District Beed.

..RESPONDENT
(Orig. Plaintiff No.2)

....
Mr. D. M. Hang : A/2 in SA 128/1993
and Respondent in SA 205/93
Mr. B. A. Darak : R/1A to 1-C & 2 in SA 128/93 and
Appellant in SA 128/1993
....

CORAM : S. G. MEHARE, J.

Reserved on : 08.12.2023

Pronounced on : 16.02.2024

JUDGMENT:-

1. The original plaintiffs and original defendants No.1 and 2
have impugned the same Judgment and Decree of the learned

IIIrd Additional District Judge, Beed, passed in Regular Civil Appeal No. 20 of 1986 dated 5.9.1992.

2. The parties to the appeal would be referred to as per their original status in the suit.

3. The plaintiffs had filed a suit for partition and separate possession. Rangnath was the owner of suit lands. He died on 30/31/03/1961. The plaintiff, No.1 Jaibai, claimed that she married Rangnath and the plaintiff, no.2 Rajaram, was his posthumous son. The defendant, Gangubai, was the daughter of Ranganath. He had another wife, Laxmibai. She was defendant No.1 in the suit. When the suit was filed, she was dead. Hence, her name was deleted from the plaint. After the death of Rangnath, her stepson Bajirao was the Karta of the family. They were the members of the joint family. After the death of Bajirao, the plaintiffs could not pull on with his sons. Hence, they started resing separately. The plaintiffs had claimed a 12/25th share in the suit properties.

4. The contesting defendant denied the plaintiffs' claim that plaintiff Jaibai was the wedded wife and plaintiff No. 2 was the son of Rangnath. They came with a case that the plaintiff was the wife of Waman Eknath r/o Yellamlbghat. She married him in 1965. The plaintiff No.2 was his son. He was not the legitimate son of Ranganath. The plaintiffs were not the legal heirs of Rangnath. Therefore, the suit is bad in law. It has also been averred in the written statement that Jaibai was allegedly married when the first marriage of Rangnath was subsisting. Laxmibai was his first wife; the remaining defendants, Bajirao and his legal heirs, and Gangubai were his legal heirs.

5. The first appellate Court upheld the Judgment and decree of the Court of First Instance. However, he held that plaintiff No.2 was a child of a void marriage. Hence, he is entitled to equal share and modified the order of the Court of First Instance to that extent and granted 1/4 the share to the sons and daughters of Ranganath.

6. By an order dated 15.04.1993, the Court admitted the Second Appeal No. 128 of 1993. The said order read thus:-
"Heard.

Admit, grounds Nos. 4,5, 7 and 9".

The above grounds from the appeal memo have been reproduced thus:-

(IV) Whether the daughter Gangubai, would be entitled for the equal share in the share of her father alone in the whole properties left by the deceased father?

(V) Whether the lower Appellate Court is justified in not considering the cross-objection of the plaintiffs which they have filed in the appeal of the respondents?

(VII) Whether the Courts below are justified in making the share of the appellants to 1/4th as against their claim of 1/4th in the suit properties?

(IX) Whether the Courts below applied properly the provisions of law of Hindu Succession and Partition to the case of the plaintiffs?

7. In Second Appeal No. 205 of 1993, this Court passed an order dated 7.7.1993. The said order reads thus:-

"Heard. Shri. R. R. Jethalia, learned Advocate for the appellants.

The S. A. is admitted vide ground Nos. I to V".

The ground Nos. I to V are reproduced thus:-

(I) That, admittedly the suit property is ancestral joint family property left by deceased Rangnath at the time of his death in the year 1961. Both the Courts below committed material error of law in calculating the share which could be allotted to the present respondent (original plaintiff No.2) from the share which the deceased Rangnath could have been allotted by way of notional partition immediately on the date of death. This is substantial question of law.

(II) That, both the Courts below have concurrently held that the present respondent is an illegitimate child of deceased Rangnath born from the original plaintiff No.1, whose marriage with the deceased Rangnath has held to be null and void under the provisions of the Hindu Marriage Act. In that event of the matter, the present respondent could inherit only to the property fallen to the share of deceased Rangnath at the time of his death along with the original defendants No.1 to 3 equally. Ignoring the mandatory provisions of Sec. 16(3) of the Hindu Marriage Act and Section 6 of the Hindu Marriage Act, the decree under appeal has been passed. This is a substantial illegality going to the root of the matter.

(III) That, in the year 1961, deceased Rangnath left behind Bajirao the son, Laxmibai the wife and Gangubai the daughter (appellant No.1) along with the present

respondent Rajaram. The share of deceased Rangnath in the year 1961 in the joint family property could be only 1/3rd, the other 2/3rd share being that of son and wife of the deceased. It is from the 1/3rd share of the deceased Rangnath that the present respondent could claim by way of inheritance equally along with the widow, son and daughter of the deceased Rangnath. This would reduce the claim of the present respondent to 1/4th in the 1/3rd share of the deceased Rangnath and the same would come to 1/12th in the entire suit property. This simple calculation regarding the share of the present respondent in the share allotted to the deceased Rangnath by way of notional partition in the year 1961 has rendered the Judgment and decree under appeal vitiated by material illegality. This is a substantial question of law sufficient for this Court to interfere in the second appeal.

(IV) That, the approach of the lower appellate Court in the matter of deciding the share of the present respondent as is revealed in para 35 and 36 of the Judgment under appeal is patently illegal and erroneous and the same constitutes a sufficient justification for this Hon'ble Court to interfere with the same in the present second appeal.

(V) That, it ought to have been held by the Courts below that the present respondent is not even the illegitimate child of deceased Rangnath born to original plaintiff No.1 Jaibai. The evidence in this connection is absolutely not sufficient and the finding recorded by the

lower appellate Court are perverse and the same also deserves to be quashed and set aside.

8. Hearing the learned respective counsels, the Court has reformulated the substantial questions of law involved in these two appeals as follows:-

- (I) Is the daughter entitled to equal share?
- (II) Could there be a notional partition, and plaintiff No.2, the illegitimate son, is entitled to the share from the father's share only as provided under Sections 16(3) of the Hindu Marriage Act?
- (III) Did the first appellate Court not properly appreciate the plaintiffs' cross-objection properly?
- (IV) Did the appellate Court determine the shares correctly?

9. The learned counsel for the original defendants has vehemently argued that the plaintiffs did not prove the marriage and legitimacy of a child. She did not produce cogent and reliable evidence to prove that she married Ranganath. Plaintiff No. 2 was born after the death of Ranganath. He was not a child born out of the void or voidable marriage. Therefore, they were not members of the Hindu joint family and were not entitled to claim partition.

The impugned orders are against the law. Unless the marriage is proven, a child born out of such a relationship is illegitimate. Plaintiff No.1 was also not entitled to share because, at the time of her alleged marriage, the first marriage of Rangnath subsisted, and his wife, Laxminabi, was alive. The other respondents, who were the defendants, supported the arguments of the learned counsel for the defendants who preferred the appeal. Adv Darak relied on the recent Judgment of the Hon'ble Supreme Court in Ravansiddappe and Anr V Mailikarju and Ors Civil Appeal No. 2844/2011 with other appeals and argued that plaintiff No. 2 is not entitled to the share.

10. Per contra, the learned counsel for the original plaintiffs argued that daughter Gangubai was married. She was 22 years old. She was not a coparcenary. Therefore, she was not entitled to equal share at par with the sons of Ranganath. The learned first appellate Court erroneously held her entitled to equal share. He wrongly applied section 8 of the Hindu Succession Act. He argued that it was proved that plaintiff No. 2 was the posthumous child of Ranganath. His marriage with the plaintiff No.1 was also

proved. The Courts did not consider the material admission that Laxmibai was dead when plaintiff No.1 married Ranganath. The first appellate Court did not consider the cross-objections to the appeal. His Judgment and decree is illegal, incorrect and improper. Therefore, it is liable to be set aside.

11. The legitimacy and marriage go to the root of the dispute. Section 16 of the Hindu Marriage Act speaks of the legitimacy of a child born out of void and voidable marriages. Sub-section (1) relates to children born of marriage, which is void under Section 11, regardless of whether a decree of nullity of marriage has been granted in any proceeding under the Hindu Marriage Act or otherwise. The said provisions are applicable even in the case of a child born before the amendment of 1976. In case the marriage of the parents is void under Section 11 of this Act, the protection given to the child in case of any such marriage is complete as laid down in the sub-section subject, of course, to the rule enacted in sub-section (3).

12. Section 11 of the Hindu Marriage Act speaks of void marriages, and Section 12 speaks of voidable marriages. It was

the defence of the defendant that Jaibai did not marry Rangnath, and she did not prove her marriage to Rangnath. She was married to another person, and plaintiff No.2 was born out of their marital relationship. The marriage of male and female is a precondition to claim the legitimate right under Section 16 of the Hindu Marriage Act. The plaintiff and deceased Ragnath were Hindu. Therefore, the marriage of plaintiff No.2 was to be proved as per the provisions of the Hindu Marriage Act. Section 7 of the Hindu Marriage Act speaks of the ceremony of the Hindu Marriage. The Hindu marriage may be solemnized as per the customary rites and ceremonies of either party. In Hindu Marriage, the word 'solemnized' means celebrating the marriage in proper ceremony and due form. It cannot be said solemnized unless the marriage is celebrated and performed with proper ceremonies and in the due form. However, there is an extremely strong presumption in favour of the validity of a marriage and legitimacy of his offspring if, from the time of the alleged marriage, the parties are recognized by all the persons concerned as a husband and wife and are so described in the important documents and on important occasions. Similarly, the fact that the woman was living

under the protection of a man, who generally lived with her and acknowledged her and her children raises a strong presumption that she is the wife of that person. However, this presumption may be rebutted by proof of facts showing that no marriage could have taken place. The formalities and customs of a valid marriage are also to be presumed to be performed if the presumption of marriage arises for long cohabitation.

13. Both the Courts, appreciating the evidence, held that Jaibai married Ragnath when his marriage subsisted with Laxmibai. She had led the evidence that she was the wife of Rnaganth. The evidence of the witnesses and other relevant documents showing their nexus with Ranganath has also been correctly appreciated. She had discharged her burden to prove that she was the wedded wife of Ranganth, and plaintiff No. 2 was born out of their marital relationship. Soon after proving the marriage, the burden was shifted on the defendant to prove that she was the wife of another person and plaintiff No.2 was his son. It was a heavy burden on the defendants to prove such serious allegations. However, the

courts weighed the evidence and correctly held that plaintiff No.2 Rajaram was the son of Rangnath.

14. Though the marriage is null and void under Section 11, any child who would have been legitimate if the marriage is valid, a child born from such a marriage, has the legitimate right to claim the share of her father.

15. The first appellate Court reproduced the view of this Court in the case of *Shantaram Tukaram Patil Vs. Smt. Dagdubai Tukaram Patil AIR 1987 Bombay 182*, which reads thus;

"A child of a void marriage is related to his parents within the meaning of S. 3 (1) (j), of the Hindu Succession Act because the provision of Section 16, Hindu Marriage Act, proviso to S. 3 (1) (j) must be confirmed to those children who are not clothed with legitimacy under S. 16 of Hindu Marriage Act".

16. The Hon'ble Supreme Court in the case of *Revanasiddappa and Another Vs. Mallikarjun and Others Civil Appeal No. 2844 of 201*, pronounced the verdict on the rights of a child born of the

void marriage under section 16 (3) of the Hindu Marriage Act and held that a child who is conferred with legislative legitimacy under Section 16(1) and 16(2) would not be entitled to the right in or to the property of any person other than the parents. The property of parents, where the parents had an interest in the property of a joint Hindu family, governed under the Mitakshra law, has to be ascertained in terms of the explanation to sub-section 3.

17. It has also been observed in concluding part of the said Judgment in clause (iii) of paragraph No. 54 that "while conferring legitimacy in terms of sub-section (1) on a child born from a void marriage and under sub-section (2) to a child born from a voidable marriage which has been annulled, the legislature has stipulated in sub-section (3) of Section 16 that such a child will have rights to or in the property of the parents and not in the property of any other persons."

18. The law is well settled that a child who has been conferred with legitimacy under sub-section (1) and (2) of Section 16 of the Hindu Marriage Act will be at par with other legitimate children.

In view of the law stated above, it could not be accepted that plaintiff No. 1 would be entitled to the share in 1/3 share of the father by a notional partition.

19. There is no serious dispute that Gangubai was the married daughter of Rangnath. Before the amendment of 2005, she was not the coparcener; hence, she had no right to claim the partition until the death of the father. Recently, in the case of **Vineeta Sharma Vs Rakesh Sharma 2020 9 SCC 1**, the Hon'ble Supreme Court held that a woman/ daughter should also be considered a joint legal heir as a son and can inherit the ancestral property equally as male heirs, irrespective of the fact that the father is not alive before the Hindu Succession (Amendment) Act 2005 came into effect. By the amendment of 2005, the woman/daughters are at par with the male members of the family. The daughters are now the coparceners. They have rights in the property by birth. The daughters are considered joint legal heirs as sons and can inherit the ancestral property equally as males.

20. In this case, succession was opened in 1961. However, she was in a class I heir. Since she was no coparcener, she had no right to claim the partition during the father's lifetime. However, after the death of her father, she was entitled to get a share in her father's share. Therefore, the rule of notional partition was applied. There is a sea change in the rule of succession and shares of males and females. The male and female legal heirs are brought at par. There were various opinions of this Court of Law on the rights of women under the amendment of 2005. Finally, Vineeta Sharma (supra) laid down the law that though the father is not alive on the amendment of 2005, the daughters have an equal share as a coparcener.

21. In view of the law laid down by the Hon'ble Supreme Court, in the case of Vineeta Sharma, the defence of a notional partition pursuant to proviso Section 6 of the unamended Act is no longer available. The Apex Court also expressly held that any claim for partition in which the final decree is yet to be drawn is now to be determined in accordance with the Vanita Sharma verdict. It does not specifically deal with those final decrees

proceedings that have already been concluded based on the earlier law laid down in the Prakash Vs. Phulavati Judgment. In this case, the final decree has not yet been passed. The suits were contested and brought up to this Court. Therefore, the amendment of Section 2005 has a retroactive effect, and that would apply to the case at hand.

22. Though the law of equal share at par with the male members was not available to the daughters at the time when the suit was filed, and the First Appellate Court determined the equal share, the developments of the law by introducing amendment 2005 conferred equal rights to the daughters in the property. Therefore, it cannot be said that the first appellate Court had committed a mistake in determining the shares

23. After having gone through the cross-objections and the core issue of the case, this Court is of the view that the first Appellate Court did not make a mistake in dealing with the cross-objections.

24. In view of the above, question No.1 is answered that the daughter is entitled to equal share at par with male members. Question No. 2 is answered that there would be no notional partition, and plaintiff No.2, a son, is entitled to an equal share. Questions No. 3 and 4 are answered that the appellate did not make a mistake in dealing with the cross-objection and correctly determined the shares.

25. For the reasons stated above, the Court concludes that the appeals deserve to be dismissed. Hence, the following order:-

ORDER

- (i) Both appeals stand dismissed.
- (ii) No order as to costs.
- (iii) Record and Proceeding be returned to the Court of first instance.

(S. G. MEHARE)
JUDGE

ysk/